Petition

81-1498

NO.

Supreme Court, U.S.
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1981

SAMUEL CAVALIERI,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

Whether due process of law requires that the trial court, after citing petitioner for civil contempt, also advise him that he could be prosecuted criminally for precisely the same acts that constituted the civil contempt.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

TO: THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES, AND THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT:

The petitioner, Samuel Cavalieri, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered on January 15, 1982, affirming a judgment of the United States District Court for the Eastern District of New York, rendered on August 14, 1981, convicting him of the crime of criminal contempt in violation of Title 18, U.S.C. §1401.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on January 15, 1981 and is set forth in the Appendix hereto.

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

No extension of time within which to file the instant petition had been sought.

STATEMENT OF THE CASE

Petitioner was charged in a single count indictment with the crime of contempt, which was allegedly committed before the Grand Jury on February 29, 1980. He proceeded to trial on April 30, 1981 before the Honorable Mark A. Constantino.

The scenario of events, that culminated in petitioner's present conviction for contempt, commenced when he was subpoenaed before a Grand Jury in the Eastern District which was conducting an investigation to determine *inter alia* whether Louis Sanzo, the president of Local 29 of the Blasters, Drillrunners and Miners Union had received illegal payments and whether Louis Sanzo had attempted to evade income taxes due and owing the United States Government.

On February 7, 1980, when petitioner first appeared before the Grand Jury, he invoked his Fifth Amendment privilege and thus refused to testify on the ground that his

answers might tend to incriminate him (60)*. Accordingly, on this same date, Honorable Jacob Mishler issued an order directing that petitioner be granted immunity pursuant to Title 18, U.S.C. §18, and further ordered that he give testimony before the Grand Jury (57-58).

Thereafter, on February 28, 1980, following arguments that petitioner was unable to testify before the Grand Jury because of his physical condition, the Court then made the following ruling:

> I find there is no reason, physical or legal, that in any way inhibits, prevents this witness from appearing before the Grand Jury. And I find that the claim of physical inability is spurious, offered purely for the purpose of delay, and I direct the witness to immediately appear before the Grand jury and answer all questions properly put before it.
>
> If the witness refuses to do it, I will be available only because the trial before me will have to be adjourned because of the illness of the assistant.
>
> I think Mr. Cavalieri hears me. He heard me say the last time that in the event he refuses to answer questions before the Grand Jury, the Court may summarily commit him to the Attorney General to be committed at the M.C.C. for a term not exceeding the life of the current Grand Jury or six months, whichever term is the lesser.
>
> So the penalty for contempt is clear and it will be swift. I don't think this Court should tolerate unnecessary delays and spurious claims that result in unnecessary delays. (75-76)

Hence, on February 29, 1980, when petitioner refused to answer any questions before the Grand Jury on the ground that it might incriminate him, he was again taken before Judge Mishler at which time the Government re-

*Numerical references are to the pages of the trial transcript.

quested that he be held in contempt (84-86). When petitioner refused to answer the questions posed by the court, which had been asked of him before the Grand Jury, the court found petitioner to be in contempt of court (87-91). Whereupon, the Court stated:

> I am signing a commitment order placing him in the custody of the United States Marshal for the period indicated.
>
> And if at anytime you decide to answer those questions, you will be brought back to the Grand Jury and released.
>
> The statement is, you have the keys to the jailhouse in your mouth. (91)

REASONS FOR GRANTING THE WRIT

Due process requires that the trial court, after citing petitioner for civil contempt, also inform him that he could be prosecuted criminally for precisely the same acts constituting the civil contempts.

This Court has never determined the critical issue raised herein of whether due process requires the court to give preindictment notice to an individual held in civil contempt for his refusal to testify before a grand jury following a grant immunity that he could also be subject to a charge for criminal contempt. The Circuit courts passing on this particular question have taken conflicting positions. The Ninth Circuit in both *Yates v. United States,* 227 F.2d 851 (9th Cir., 1955) and *Daschbach v. United States,* 254 F.2d 687 (9th Cir., 1978) have adopted the position that a defendant, who has been incarcerated pursuant to a civil contempt citation, is entitled to know that he may yet be subjected to a definite penalty for contempts and that the "coercive restraining is not intended to relieve him of the punishment for the criminal refusal which he

has already uttered." *Yates v. United States,* 227 F.2d at pp. 850-851. In other words, the Ninth Circuit is of the opinion that the fundamental concepts of due process require as an additional safeguard that a criminal contempt conviction will not be sustained unless the defendant has received positive notification from the court that not only will he be subject to a period of indefinite confinement emanating from his civil contempt citation, but also he could be subject to incarceration for a definite term of years in a criminal contempt proceeding.

However, recently, in the present case and the related case of *United States v. Petito,* __ F.2d __ (2d. Cir., decided 1/26/82, docket no. 81-1333), the Second Circuit, in passing on this question of first impression in its jurisdiction, flatly rejected the holdings of the *Yates* and *Daschbach* cases. The Court was of the opinion that such a notice requirement would be tantamount to adopting the doctrine that ignorance of the law is an excuse, and accordingly, the court concluded that it has not been convinced that a wholly new procedural right of notice should be adopted in criminal contempt proceedings. We submit that the Second Circuit's position is unsound. Petitioner is certainly not claiming that ignorance of the law is a defense to any criminal contempt charge. Petitioner is only claiming that due process requires as a condition precedent to holding a defendant in civil contempt that he be advised that he also could be subject to criminal contempt charges.

The importance of adopting such a notice requirement is demonstrated by the facts of this case. Not only did the Court fail to advise petitioner of the possibility that he could be indicted for criminal contempt after being cited for civil contempt, but the court also actually misled him into believing that he would be able to purge himself at any time thereafter, and thus resolve the entire matter. Hence, after ordering petitioner's confinement, the court told him:

> "And if at any time you decide to answer those questions, you will be brought back to the Grand Jury and released.
>
> The statement is, you have the keys to the jailhouse in your mouth." (91)

Implicit in the words of the court was the misleading caveat that petitioner simply had to answer the questions put to him and he would be released. At no time was petitioner ever warned by the court that the very same acts, which served as a basis for the civil contempt citation, could also expose him to criminal liability. He was never advised that not only could he be sentenced to an indefinite term of incarceration for the civil contempt, but if prosecuted criminally, he could also receive a lengthy definite term of imprisonment. In short, petitioner, was led to believe only that he held the keys to the jailhouse in his own mouth and thus by giving the required testimony, he could free himself. Fundamental due process consideration require that both notice be given regarding the possible consequences of the civil contempt citation, and even more important, that the court refrain from misleading a defendant into believing that he could free himself at any time from any and all contempt charges.

Finally, we would stress that if this Court decides that the trial court had a constitutional obligation to advise petitioner of the possibility of a criminal contempt prosecution and also finds that the court did in fact mislead petitioner into believing that he could purge himself of any and all contempt at any time, we would assert that such a constitutional obligation cannot be deemed waived by petitioner. If the court is constitutionally obligated to perform a specific function, it has been held in other areas that a defendant's failure to specifically address the court's failure to adhere to its duty did not waive the constitutional claim. *Machibroda v. United States,* 368 U.S. 487 (1962); *North Carolina v. Alford,* 400 U.S. 257 (1970);

Pate v. Robinson, 383 U.S. 375 (1966). The same rationale must be applied herein.

Accordingly, we urge that this Court grant petitioner's application for a writ of certiorari in order to resolve this important issue, which is presently subject to different interpretations by the various Circuits.

CONCLUSION

For these reasons, a writ of certiorari should be issued to review the judgment and opinion of the Court of Appeals for the Second Circuit.

Respectfully submitted,

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Appendix

UNITED STATES COURT OF APPEALS
for the
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit held at the United States Courthouse in the City of New York, on the 15th day of January, one thousand nine hundred and eight-two.

Present:
HONORABLE WILLIAM H. TIMBERS,
HONORABLE AMALYA L. KEARSE,
HONORABLE RICHARD J. CARDAMONE
Circuit Judges,

No. 81-1365

UNITED STATES OF AMERICA,
Appellee,

- v. -

SAMUEL CAVALIERI,
Appellant.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of New York, and was heard on submission.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment

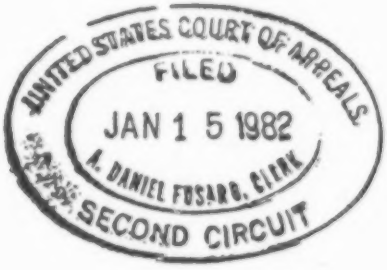
of said District Court be and it hereby is affirmed.

Appellant Cavalieri appeals from a judgment of the United States District Court for the Eastern District of New York Costantino, J. presiding, rendered on August 14, 1981, convicting him of criminal contempt under 18 U.S.C. §401. Cavalieri refused to testify before a grand jury after receiving a grant of immunity and was indicted by the grand jury for contempt. He was tried before a jury, at which time he requested that he be permitted to call the prosecutor as a defense witness. His request was denied and he now appeals the propriety of that denial, the admission of evidence containing references to his stay on Rikers Island and the district court's failure to warn him at the time he was cited for civil contempt that he might later be tried for criminal contempt. The last of these claims is identical to that presented by the appellant in *United States v. Petito*, __F.2d__, Docket No. 81-1333, and is rejected for the reasons stated in that opinion.

Appellant claims that the prosecutor's testimony was essential to his defense on the issue of his physical state at the time he was called before the grand jury, since the prosecutor, Mr. Harmon, was allegedly in the best position to observe his physical demeanor. The practice of calling opposing counsel as a witness at trial is not favored and is acceptable only if required by a compelling and legitimate need. *United States v. Schwartzbaum*, 527 F.2d 249, 253 (2d Cir. 1975). *See also Vitagliano v. United States*, 601 F.2d 69, 73 (2d Cir. 1979). In *Schwartzbaum* this court did not find compelling need when other means were available to elicit the desired information. Here the testimony regarding Cavalieri's physical state which counsel sought to elicit from Mr. Harmon could have been obtained from any one of a number of other witnesses; for example, either of the doctors whose reports were offered in evidence or the attorney who represented Cavalieri during his grand jury appearances could have testified. We also

note that counsel did not argue at trial or in his summation that appellant's defense to the criminal contempt charge rested on his physical inability to testify.

With respect to the final claim, at the pretrial conference to consider the admissibility of evidence appellant's counsel failed to object to the Rikers Island references when the exhibit containing them was being reviewed. In light of this and in view of counsel's own request that the entire transcript containing these references be admitted in evidence at trial, the district court properly ruled that appellant's objections were waived. Counsel also argues that it was incumbent upon the court to issue a cautionary instruction to the jury to disregard the highly prejudicial mention of appellant's stay on Rikers Island. Such ignores the fact that he made no request for a curative jury instruction at the time. Moreover, the brief, inadvertent and indirect reference to Rikers Island, in the context of a discussion of appellant's medical history, is not so prejudicial as to warrant a reversal of the conviction.



Opposition

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No. 81-1498

In the Supreme Court of the United States

OCTOBER TERM, 1981

SAMUEL CAVALIERI, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner claims that his conviction for criminal contempt should be reversed because, at the time he was held in civil contempt for refusing to testify before a grand jury, the district court failed to warn him that he could also suffer criminal sanctions for the same refusal.

1. Following a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of criminal contempt (18 U.S.C. 401). He was sentenced to a term of three and one half years' imprisonment. The court of appeals summarily affirmed (Pet. App. 1a-3a).

The evidence at trial established that in February, 1980 petitioner was subpoenaed to testify before a grand jury in the Eastern District of New York which was investigating an allegation that the president of Local 29 of the Blasters, Drillrunners and Miners Union had received illegal payments (Pet. 2). After petitioner was granted immunity, he

moved on February 28, 1979, to quash the subpoena. The court denied his motion and ordered him to answer any questions put to him before the grand jury on pain of civil contempt. The next day petitioner was again called before the grand jury and refused to answer each question; he was warned that if he persisted in his refusal he would be incarcerated for six months or the life of the grand jury. When petitioner again refused to answer, the court held him in contempt and ordered him incarcerated until he agreed to testify (Pet. 3-4). Petitioner remained in jail for six months (Sent. Min. Tr. 22).[1] He was subsequently indicted by the grand jury and convicted of contempt under 18 U.S.C. 401 for violating the court's order to testify.

2. Arguing that he misapprehended the consequences of his conduct (Pet. 5-6), petitioner claims that he was denied due process because the district court failed to warn him at the time he was cited for civil contempt that he could later be subject to prosecution for criminal contempt. At the outset, we note that petitioner waived this claim by failing to raise it in the district court as required by Rules 12(b)(1) and 12(g) of Fed. R. of Crim. P. Cf. *United States* v. *Lovasco*, 431 U.S. 783, 788-789 n.7 (1977). In any event, the claim is without merit.

As the Second Circuit recently stated in *United States* v. *Petito*, 671 F. 2d 68, 72 (1982), civil and criminal contempt sanctions serve different purposes: one is designed to compel obedience to a lawful court order, the other to punish an offense and to vindicate the power of the court. One who refuses obedience to a valid court order is subject to both penalties. *Yates* v. *United States*, 355 U.S. 66, 72 (1957).

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[1] "Sent. Min. Tr." refers to the transcript of the sentencing minutes, Aug. 14, 1981, after petitioner's conviction for criminal contempt.

The reason a contemptuous grand jury witness need not be warned of the possibility of criminal prosecution was well stated in *Petito, supra*, 671 F. 2d at 73 (footnote omitted):

> Appellant had committed the act subjecting him to criminal contempt at the moment he refused to answer questions after being granted immunity. Any remarks later made by Judge Bramwell, when Petito appeared before him for the second time, were after the fact of the contemptuous act. Appellant had already chosen to disregard the law and risk the consequences. To suggest that he is entitled to notice of those consequences or of the crime he had already committed as a prerequisite to being prosecuted is tantamount to adopting the doctrine—which we recently rejected as unsound—that ignorance of the law is an excuse. We have not been convinced that we should adopt a wholly new procedural right of notice in criminal contempt proceedings.

Indeed, it would be somewhat disingenuous for petitioner even to claim that he was unaware of the possibility that refusal to testify could be punished by criminal contempt. In 1970 petitioner was convicted in New York state court of criminal contempt for his refusal to testify before a grand jury after having been given immunity; he was sentenced to one year in prison. In affirming petitioner's conviction, the New York Court of Appeals noted that the punishment should not have come as any surprise to petitioner:

> even though immunity, both testimonial and transactional, was conferred by the Grand Jury and the meaning thereof explained in simple language, there was a continuing, considered and contumacious refusal by the defendant to answer questions which were clearly relevant to the stated purpose of the inquiry * * *.

People v. *Cavalieri*, 29 N.Y.2d 762, 763 (1971). Moreover, petitioner was represented by counsel before the federal grand jury (Tr. 62-92).[2] Given these circumstances, a claim that petitioner was surprised at being punished for contempt for his refusal to obey a court order is singularly unpersuasive.

3. Petitioner argues that the court of appeals' decision conflicts with the Ninth Circuit's decisions in *Yates* v. *United States*, 227 F. 2d 848 (9th Cir. 1955), and *Daschbach* v. *United States*, 254 F. 2d 687 (9th Cir. 1958). The underlying proceeding in each of those cases was a prosecution under the Smith Act. In both cases the defendants were held in civil contempt for refusing to answer questions on cross examination, and were subsequently found in criminal contempt in proceedings under Fed. R. Crim. P. 42(a) for the same acts.[3] The Ninth Circuit held that the latter penalty could not be superimposed unless a defendant had been warned of its possibility at the time he was held in civil contempt.

Neither of those cases has ever been followed in the Ninth Circuit or elsewhere,[4] and there is no indication that even the Ninth Circuit would require their application in non-summary criminal contempt proceedings under Rule 42(b). As this Court made clear in *United States* v. *Wilson*, 421 U.S. 309 (1975), and *Harris* v. *United States*, 382 U.S. 162 (1965), summary contempt under Rule 42(a) should be imposed guardedly. Its imposition is justified for refusals to

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[2]"Tr." refers to the transcript of petitioner's trial for criminal contempt.

[3]In *Daschbach* a witness for the defendants was also convicted of contempt. 254 F. 2d at 688.

[4]In *United States* v. *Abascal*, 509 F. 2d 752, 755 n.3 (9th Cir. 1975), the Ninth Circuit distinguished *Yates* and *Daschbach* from another claim of right to notice about criminal contempt sanctions.

testify in the course of a criminal trial, but not during grand jury proceedings, because only in the former situation is there a need "to act swiftly and firmly to prevent contumacious conduct from disrupting the orderly progress of a criminal trial." *United States* v. *Wilson, supra*, 421 U.S. at 319; *Harris* v. *United States, supra*, 382 U.S. at 164. That justification is no longer available when Rule 42(a) is invoked, as it was by the trial courts in *Yates* and *Daschbach*, after the trial is over. The Ninth Circuit's reversal of those convictions might thus be understood as an effort to implement the policy of strictly overseeing use of the summary contempt power.

In contrast to the defendants in *Yates* and *Daschbach*, petitioner received the full benefit of the "procedural regularity" prescribed by Rule 42(b). See *Harris* v. *United States, supra*, 382 U.S. at 167. Rather than being summarily punished by a judge, he was indicted by the grand jury for his violation of 18 U.S.C. 401, and was tried on the contempt charge before a jury. He was fully aware, from his prior conviction of contempt in New York state court, of the consequences of his refusal testify. Moreover, there is no doubt but that a jury had the authority to convict him notwithstanding his earlier confinement for civil contempt. It would be extravagant to say that the plenary notice and hearing which he received should be supplemented by a further admonition from the judge about the consequences of a crime for which, as petitioner knew from experience, he could be prosecuted.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

APRIL 1982

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